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Settlement of commercial disputes

Draft Guide to Enactment of the UNCITRAL [Model Law on International Commercial Conciliation]

Note by the Secretariat

1. At its thirty-second session, in 1999, the Commission had before it a note entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460). Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission generally considered that the time had come to assess the extensive and favorable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[1]

2. The Commission entrusted the work to one of its working groups, which it named the Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,[2] requirement of written form for the arbitration agreement,[3] enforceability of interim measures of protection[4] and possible enforceability of an award that had been set aside in the State of origin.[5]

3. At its thirty-third session, in 2000, the Commission had before it the report of the Working Group on Arbitration on the work of its thirty-second session (A/CN.9/468). The Commission took note of the report with satisfaction and reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with the topics identified for future work. Several statements were made to the effect that, in general, the Working

[1] *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.
[2] Ibid., paras. 340-343.
[3] Ibid., paras. 344-350.
[4] Ibid., paras. 371-373.
[5] Ibid., paras. 374 and 375.

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Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those which the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "the New York Convention") (A/CN.9/468, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention (para. 109 (i)); and the power by the arbitral tribunal to award interest (para. 107 (j)). It was noted with approval that, with respect to "online" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (para. 107 (m)), the view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.[6]

4. At its thirty-fourth session, held in Vienna from 25 June to 13 July 2001, the Commission took note with appreciation of the reports of the Working Group on the work of its thirty-third and thirty-fourth sessions (A/CN.9/485 and A/CN.9/487, respectively). The Commission commended the Working Group for the progress accomplished so far regarding the three main issues under discussion, namely, the requirement of the written form for the arbitration agreement, the issues of interim measures of protection and the preparation of a model law on conciliation.

5. With regard to conciliation, the Commission noted that the Working Group had considered articles 1-16 of the draft model legislative provisions (A/CN.9/WG.II/WP.113/Add.1). It was generally felt that work on those draft model legislative provisions could be expected to be completed by the Working Group at its next session. The Commission requested the Working Group to proceed with the examination of those provisions on a priority basis, with a view to the instrument being presented in the form of a draft model law for review and adoption by the Commission at its thirty-fifth session, in 2002.[7]

6. At the close of its thirty-fourth session, the Working Group requested the Secretariat to prepare revised drafts of those articles together with a draft Guide to Enactment, based on the discussion in the Working Group, for consideration at its next session (A/CN.9/487, para. 20). This note contains the first draft of the Guide to Enactment.

[6] Ibid., *Fifty-fifth Session, Supplement No. 17* (A/55/17), para. 396.
[7] Ibid., *Fifty-sixth Session, Supplement No. 17* (A/56/17), paras. 309-315.

Annex

Guide to Enactment of the UNCITRAL [Model Law on International Commercial Conciliation]

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Guide to Enactment of the UNCITRAL [Model Law on International Commercial Conciliation]

Purpose of this guide

1. In preparing and adopting model legislative provisions on international commercial conciliation, the United Nations Commission on International Trade Law (UNCITRAL or "the Commission") was mindful that such provisions would be a more effective tool for States modernizing their legislation if accompanied by background and explanatory information. The Commission was also aware of the likelihood that the model provisions would be used in a number of States with limited familiarity with conciliation as a method of dispute settlement. Primarily directed to executive branches of Governments and legislators preparing the necessary legislative revisions, the information provided in this Guide should also provide useful insight to other users of the text, including judges, practitioners and academics.

2. Much of this Guide is drawn from the *travaux préparatoires* of the Model Law. The Guide explains why the provisions in the Model Law have been included as essential basic features of a statutory device designed to achieve the objectives of the Model Law. When it drafted the model provisions, the Commission assumed that explanatory material would accompany the text of the Model Law. For example, some issues are not settled in the Model Law but are addressed in the Guide, which is designed to provide an additional source of inspiration to States enacting the Model Law. It might also assist States in considering which provisions of the Model Law, if any, might have to be varied to accommodate particular national circumstances.

3. This Guide to Enactment has been prepared by the Secretariat pursuant to a request made by UNCITRAL. It reflects the Commission's deliberations and decisions at the session where the Model Law was adopted, and the considerations of UNCITRAL's Working Group II (on Arbitration and Conciliation) that conducted the preparatory work.

I. Introduction to the Model Law

A. Notion of conciliation and purpose of the Model Law

4. The term "conciliation" is used in the Model Law as a broad notion referring to proceedings in which a person or a panel of persons assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. There are critical differences among the dispute resolution processes of negotiation, conciliation and arbitration. Once a dispute arises, the parties typically seek to resolve their dispute by negotiating without involving anyone outside the dispute. In arbitration, the parties entrust the dispute resolution process and the outcome of the dispute to the arbitral tribunal that imposes a binding decision on the parties. At the center of the dispute resolution continuum lies conciliation. Conciliation differs from party negotiations in that conciliation involves independent and impartial third person assistance to settle the dispute. It differs from arbitration because in conciliation the parties retain full control over the process and the outcome.

5. Conciliation proceedings in the above sense are envisaged and dealt with in a number of rules of arbitral institutions and institutions specialising in the administration of various forms of alternative methods of dispute resolution, as well

as in the UNCITRAL Conciliation Rules, which the Commission adopted in 1980. These Rules are widely used and have served as a model for rules of many institutions.

6. Conciliation proceedings in which parties in dispute agree to be assisted in their attempt to reach a settlement may differ in procedural details depending on what is considered the best method to foster a settlement between the parties. The provisions governing such proceedings, as contained in the Model Law, are designed to accommodate those differences and leave the parties and conciliators free to carry out the conciliatory process as they consider appropriate.

7. In practice, proceedings in which the parties are assisted by a third person to settle a dispute are referred to by expressions such as conciliation, mediation or similar terms. The notion of "alternative dispute resolution" is also used to refer collectively to various techniques and adaptations of procedures for solving disputes by conciliatory methods rather than by a binding method such as arbitration. The Model Law uses the term "conciliation" as synonymous to all those procedures. To the extent that such "alternative dispute resolution" procedures are characterised by features mentioned above, they are covered by the Model Law.

8. Conciliation is being increasingly used in dispute-settlement practice in various parts of the world, including regions where until a decade or two ago it was not commonly used. This trend is reflected, for example, in the establishment of a number of private and public bodies offering services to interested parties designed to foster the amicable settlement of disputes. This trend, a growing desire in various regions of the world to promote conciliation as a method of dispute settlement, and experience with national legislation on conciliation have given rise to discussions calling for internationally harmonised legal solutions designed to facilitate conciliation.

B. The Model Law as a tool for harmonising legislation

9. A model law is a legislative text that is recommended to States for incorporation into their national law. Unlike an international convention, model legislation does not require the State enacting it to notify the United Nations or other States that may have also enacted it. States are strongly encouraged, however, to inform the UNCITRAL Secretariat of any enactment of the new Model Law (or any other model law resulting from the work of UNCITRAL).

10. In incorporating the text of the model legislation into its legal system, a State may modify or leave out some of its provisions. In the case of a convention, the possibility of changes being made to the uniform text by the States parties (normally referred to as "reservations") is much more restricted; in particular trade law conventions usually either totally prohibit reservations or allow only very few, specified ones. The flexibility inherent in model legislation is particularly desirable in those cases where it is likely that the State would wish to make various modifications to the uniform text before it would be ready to enact it as national law. Some modifications may be expected in particular when the uniform text is closely related to the national court and procedural system. This, however, also means that the degree of, and certainty about, harmonisation achieved through model legislation is likely to be lower than in the case of a convention. Because of the flexibility inherent in a model law, the number of States enacting model legislation is likely to be higher than the number of States adhering to a convention. In order to achieve a satisfactory degree of harmonisation and certainty, States should consider making as few changes as possible in incorporating the new Model Law into their legal systems, but, if changes are made, they should remain within the basic principles of the Model Law. A significant reason for adhering as much as possible to the uniform text is to make the

national law as transparent and familiar as possible for foreign parties, advisers and conciliators who participate in conciliations in the enacting state.

C. Background and history

11. International trade and commerce have grown rapidly with cross-border transactions no longer being limited to the largest corporate powers or nations as the contracting parties. With electronic commerce expanding exponentially, where business is frequently conducted across national boundaries, the need for effective and efficient dispute resolution systems has become paramount. UNCITRAL has drafted the Model Law to assist States in designing dispute resolution processes that are intended to reduce costs of dispute settlement, foster maintaining a cooperative atmosphere between trading parties, prevent further disputes and inject certainty into international trade. By adopting the Model Law, and by educating parties engaged in international commerce about its purposes, the parties will be encouraged to seek non-adjudicative dispute settlement methods which will increase stability in the marketplace.

12. Certain issues, such as the admissibility of certain evidence in subsequent judicial or arbitral proceedings or the role of conciliators in subsequent proceedings, might be solved by reference to such rules as the UNCITRAL Conciliation Rules. There are many cases, however, where the parties have not agreed to any conciliation rules. The conciliation process might thus benefit from the establishment of non-mandatory legislative conciliation provisions for parties who mutually desire to conciliate but have not agreed on a set of conciliation process and procedure rules.

13. Moreover, in many countries where agreements as to the admissibility of certain kinds of evidence are of uncertain effect or might not address all concerns of the parties, uniform legislation provides a useful clarification. The level of predictability and certainty required to foster conciliation are best achieved through legislation.

14. The objectives of the Model Law, which include encouraging the use of conciliation and providing greater predictability and certainty in its use, are essential for fostering economy and efficiency in international trade. The prevailing view that emerged in the Commission was that it would be worthwhile to explore the possibility of preparing uniform legislative rules to support the increased use of conciliation.

[history of the model legislative provisions to be added]

Reference to UNCITRAL documents

A/CN.9/WG.II/WP.108; paras. 11-17
A54/17; para 342

D. Scope

15. In preparing the Model Law and addressing the subject matter before it, the Commission had in mind a broad notion of conciliation, which could also be referred to as "mediation", "alternative dispute resolution" and "neutral evaluation". The Commission's intent is that the Model Law be applicable to the broadest range of commercial disputes. The Commission agreed that the title of the Model Law should refer to international commercial conciliation. While a definition of "conciliation" is provided in article 2, the definitions of "commercial" and "international" are contained in a footnote to article 1 and in article 3, respectively. While the Model

Law is restricted to international and commercial cases, the state enacting the Model Law may consider extending it to domestic, commercial disputes and some non-commercial ones.

16. The Model Law should be regarded as a balanced and discrete set of rules and could be enacted as a single statute or as a part of a law on dispute settlement.

E. Structure of the Model Law

17. The Model Law contains definitions, procedures, and guidelines on related issues based upon the importance of party control over the process and outcome.

18. Articles 1 through 3 provide background and define conciliation generally and its international application specifically. These are the types of provisions that would generally be found in legislation to determine the range of matters the Model Law is intended to cover.

19. The rules in articles 4 through 9 are intended to cover procedural aspects of the conciliation. These procedural rules will have particular application to the circumstances where the parties have not adopted rules governing dispute resolution processes, and thus are designed to be in the nature of default provisions. They are also intended to assist parties in dispute that may have defined dispute resolution processes in their agreement, in this context acting as a supplement to their agreement.

20. The remainder of the Model Law addresses post-conciliation issues to avoid uncertainty resulting from an absence of statutory provisions governing these issues.

F. Assistance from UNCITRAL Secretariat

21. In line with its training and assistance activities, the UNCITRAL Secretariat may provide technical consultations for Governments preparing legislation based on the Model Law. UNCITRAL provides technical consultation for Governments considering legislation based on other UNCITRAL model laws, or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

22. Further information concerning the Model Law as well as the Guide and other model laws and conventions developed by UNCITRAL, may be obtained from the Secretariat at the address below. The Secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.

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United Nations Vienna International Centre
P.O. Box 500
A-1400, Vienna, Austria

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Telefax: (43-1) 26060-5813
Electronic mail: uncitral@uncitral.org
Internet Home Page: http://www.uncitral.org

II. Article-by-article remarks

Article 1. Scope of application

(1) These model legislative provisions apply to international commercial* conciliation, as defined in articles 2 and 3,

(a) if the place of conciliation, as agreed upon by the parties or, in the absence of such agreement, as determined with the assistance of the conciliator or panel of conciliators, is in this State; or

(b) if the place of conciliation has not been agreed or otherwise determined as provided for in subparagraph (a), the place of conciliation is deemed to be in this State if any of the following places is in this State: the place of the institution that administered the conciliation proceedings; the place of residence of the conciliator or the place of business of both parties if that place is in the same country.

(2) These model legislative provisions also apply to a commercial conciliation that is not international in the sense of article 3 if the parties have [expressly] agreed that the model legislative provisions are applicable to the conciliation.

(3) Articles ... apply also if the place of conciliation is not in this State.

(4) These model legislative provisions apply irrespective of whether a conciliation is carried out on the initiative of one party after a dispute has arisen, in compliance with a mutual agreement of the parties made before the dispute arose, or pursuant to a direction or [request] [invitation] of a court or competent governmental entity.

(5) These model legislative provisions do not apply to:

(a) cases where a judge or an arbitrator, in the course of adjudicating a particular dispute, conducts a conciliatory process; and

(b) [...].

*The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

23. The purpose of article 1, which is to be read in conjunction with the definition of "conciliation" in article 2 and the definition of "international" in article 3, is to delineate the scope of application of the Model Law. In preparing the Model Law, the Working Group generally agreed that the application of the uniform rules should be restricted to commercial matters. The term "commercial" is defined in footnote* to article 1(1). The purpose of the footnote is to be inclusive and broad and to overcome any technical difficulties that may arise in national law as to which transactions are commercial. No strict definition of "commercial" was provided, the intention being that the term be interpreted broadly so as to cover matters arising from all relationships of a commercial nature, whether contractual or

not. The footnote to article 1 provides an illustrative list of relationships that are to be considered commercial, thus emphasizing the width of the suggested interpretation and indicating that the test is not based on what the national law may regard as "commercial". This may be particularly useful for those countries where a discrete body of commercial law does not exist. In certain countries, the use of footnotes in a statutory text might not be regarded as acceptable legislative practice. National authorities enacting the Model Law might thus consider the possible inclusion of the text of the footnote in the body of the enacting legislation itself.

24. The Model Law would apply if the place of conciliation is in the enacting State. The Working Group, during the course of preparing the Model Law, expressed the view that the territorial factor should be listed as the first factor to be taken into account when determining the applicability of the Model Law. The territorial factor set out in subparagraph (a) provides that the Model Law applies (assuming other elements, particularly that the conciliation is international and commercial, are satisfied) if the place of conciliation is in the enacting state. It may be noted that, while article 1(2) enables the parties to agree to extend the application of the Model Law to a non-international conciliation, it does not provide for such an extension if a conciliation does not meet the test of "commercial" as defined in the footnote to article 1.

25. Subparagraph (a) is designed to increase certainty as to when the Model Law will apply by allowing the parties the freedom to agree upon the place of conciliation in the first instance. Failing that agreement, it is for the conciliator or the panel of conciliators, to assist the parties in determining that place. To avoid conflict and to promote certainty, the parties should be encouraged to agree on the place of conciliation in their agreements.

26. Subparagraph (b) aims to address circumstances where the place of conciliation has not been agreed upon or determined or where, for other reasons, it may not be possible to establish the place of conciliation. In this situation, this paragraph provides that the Model Law will apply if any of the following places is in the enacting state: the institution administering the conciliation; the residence of the conciliator, the parties' places of business, if those places are in the same country.

27. Paragraph 2 allows the parties to agree to the application of the Model Law (ie. to opt-in to the Model Law) even if the conciliation is not international as defined in the Model Law.

28. Nothing in the Model Law should prevent an enacting State from extending the scope of the Model Law to cover conciliation outside the commercial sphere [or to allow the parties to agree that the Model Law applies in respect of a non-commercial conciliation].

29. In principle, the Model Law only applies to international conciliation as defined in article 3. An enacting State may in the implementing legislation, however, extend the applicability of the Model Law to both domestic and international conciliation.

30. Paragraph (3) enumerates the provisions which should produce effects in the enacting State even if the conciliation proceedings took place in another country and would thus not generally be covered by the law of the enacting State. [Those provisions are...].

31. Paragraph (4), while recognizing that conciliation is a voluntary process based on the agreement of the parties, also recognizes that some countries have taken measures to promote conciliation for example, by requiring the parties in certain situations to conciliate or by allowing judges to suggest to parties or to require that parties conciliate before they continue with litigation. In order to remove any doubt

about the application of the Model Law in all these situations, paragraph (4) provides that the Model Law applies irrespective of whether a conciliation is carried out on the initiative of a party or pursuant to a legal requirement or request by a court. It is suggested that, even if the enacting State does not require parties to conciliate, the provision should nevertheless be enacted because parties in the enacting State may commence conciliation proceedings pursuant to a request by a foreign court, in which case the Model Law should also apply.

32. Paragraph (5) allows enacting States to exclude certain situations from the sphere of application of the Model Law. Subparagraph (a) expressly excludes from the application of the Model Law any case where either a judge or arbitrator, in the course of adjudicating a dispute, undertakes a conciliatory process. This process may be either at the request of the parties that are in dispute or in the exercise of the judge's prerogatives or discretion. This exclusion was considered necessary to avoid undue interference with existing procedural law. Another area of exclusion might be conciliations relating to collective bargaining relationships between employers and employees given that a number of countries may have established conciliation systems in the collective bargaining system which may be subject to particular policy considerations that might differ from those underlying the Model Law. A further exclusion could relate to a conciliation that is conducted by a judicial officer. Given that such judicially conducted conciliation mechanisms are conducted under court rules, it may be appropriate to also exclude these from the scope of the Model Law.

References to UNCITRAL documents

A/CN.9/487 paras. 88-99
A/CN.9/WG.II/WP.113/Add.1, paras. 2-3 and footnote 5.
A/CN.9/485 paras. 111-116
A/CN.9/WG.II/WP.110, paras. 87-88 and 90.

Article 2. Conciliation

For the purposes of these model legislative provisions, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person, or a panel of persons, to assist them [in an independent and impartial manner][and without the authority to impose a binding decision on the parties] in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contract or other legal relationship.

33. Article 2 sets out the elements for the definition of conciliation. The definition thus takes into account the agreement of the parties, the existence of a dispute, the intention of the parties to reach an amicable settlement and the participation of an impartial and independent third person that assists the parties in an attempt to reach an amicable settlement. The intent is to distinguish conciliation, on the one hand, from binding arbitration and, on the other hand, from negotiations between the parties or their representatives.

34. [The words "in an independent and impartial manner" are not intended to establish a legal requirement in the sense of providing an element necessary for determining whether the law applies. Though in that sense the words are unnecessary for defining conciliation, they have been included to emphasize its nature. The words "and without the authority to impose a binding decision on the parties" are intended to distinguish conciliation from a process such as arbitration.]

35. Inclusion of the words "whether referred to by the expression conciliation, mediation, or an expression of similar import" is intended to reflect that the Model Law applies irrespective of the name given to the process. The Commission intends that the word "conciliation" would express a broad notion of a voluntary process controlled by the parties and conducted with the assistance of a neutral third person. Different procedural styles and techniques might be used in practice to achieve settlement of a dispute, and different expressions might be used to refer to those styles and techniques. In drafting the Model Law, the Commission intended that it should encompass all the styles and techniques that fall within the context of article 2.

References to UNCITRAL documents

A/CN.9/WG.II/WP.115, paras. 9-12
A/CN.9/487 paras. 100-104
A/CN.9/WG.II/WP.113/Add.1, paras. 3-4
A/CN.9/485 paras. 108-109
A/CN.9/WG.II/WP.110, paras. 83-85.
A/CN.9/WG.II/WP.108, para. 11
A/CN.9/460 paras. 8-10

Article 3. International conciliation

(1) A conciliation is international if:

(a) the parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of conciliation; or

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected;

(2) For the purposes of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;

(b) if a party does not have a place of business, reference is to be made to the party's habitual residence.

36. In principle, the Model Law only applies to international conciliation. Article 3 establishes a test for distinguishing international cases from domestic ones. The Commission, in adopting the Model Law, agreed that the acceptability of the Model Law would be enhanced if no attempt was made to interfere with domestic conciliation. However, the Model Law contains no provision that would, in principle, be unsuitable for domestic cases. In line with this thinking, the parties are allowed to opt in to the Model Law as provided for in article 1(2). It should be noted that in some jurisdictions,

particularly in federal States, considerable difficulties might arise in distinguishing international trade from domestic trade. The Model Law should not be interpreted as encouraging enacting States to limit its applicability to international cases.

References to UNCITRAL documents

A/CN.9/487 paras. 105 - 109
A/CN.9/WG.II/WP.113/Add.1, para. 4
A/CN.9/485 paras. 117 - 120
A/CN.9/WG.II/WP.110, para. 89

Article 4. Variation by agreement

Except as otherwise provided in these model legislative provisions, the parties may agree to exclude or vary any of these provisions.

37. With a view to emphasizing the prominent role given by the Model Law to the principle of party autonomy, this provision has been isolated in a separate article. This type of drafting is also intended to bring the Model Law more closely in line with other UNCITRAL instruments (e.g., article 6 of the United Nations Convention on Contracts for the International Sale of Goods, article 4 of the UNCITRAL Model Law on Electronic Commerce, and article 5 of the UNCITRAL Model Law on Electronic Signatures). A formulation even closer to that of those existing texts would be along the following lines "The provisions of this Law may be derogated from or their effect may be varied by agreement, unless that agreement would not be valid or effective under applicable law". Expressing the principle of party autonomy in a separate article may further reduce the desirability of repeating that principle in the context of a number of specific provisions of the Model Law.

Article 5. Commencement of conciliation proceedings

(1) The conciliation proceedings in respect of a particular dispute commence on the day on which the parties to the dispute agree to engage in conciliation proceedings.

(2) If a party that invited another party to conciliate does not receive a reply within [fourteen] days from the day on which the invitation was sent, or within such other period of time as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

38. The Commission, in adopting the Model Law, agreed that paragraph (1) of this article should be harmonized with paragraph (4) of article 1. This was done to accommodate the fact that a conciliation might be carried out as a consequence of a direction or request by a dispute settlement body such as a court or arbitral tribunal. The general reference to the "day on which the parties to the dispute agree to engage in conciliation proceedings" would seem to cover the different methods by which parties may agree to engage in conciliation proceedings. Such methods may include, for example, the acceptance by one party of an invitation to conciliate made by the other party, or the acceptance by both parties of a direction or suggestion to conciliate made by a court.

39. By referring in the provision only to "agree[ment] to engage in conciliation proceedings" the Model Law leaves the determination of when exactly this

agreement is concluded to laws outside the law on conciliation. In view of the increased use of modern means of communication, the time period to reply to an invitation to conciliate has been set for fourteen days, instead of thirty days as provided for in the UNCITRAL Conciliation Rules.

40. Article 5 does not address the situation where an invitation to conciliate is withdrawn after it has been made. No specific provision to that effect (such as a provision specifying that the party initiating the conciliation is free to withdraw the invitation to conciliate until that invitation has been accepted) was added to the text to avoid interfering with the law of contract formation by introducing new rules as to the conditions under which an offer or an acceptance to conciliate might be withdrawn. Although a proposal was made during the preparation of the Model Law to include a specific provision regarding the withdrawal of an invitation to conciliate, such a provision would probably be superfluous in view of the possibility offered to both parties to terminate conciliation proceedings at any time under subparagraph (d) of article 11.

References to UNCITRAL documents

A/CN.9/487 paras. 110 - 115
A/CN.9/WG.II/WP.113/Add.1, para. 4
A/CN.9/485 paras. 127 - 132
A/CN.9/WG.II/WP.110, paras. 95-96

Article 6. Number of conciliators

There shall be one conciliator, unless the parties agree that there shall be a panel of conciliators.

41. Unlike in arbitration where the default rule is three arbitrators, conciliation practice shows that parties usually wish to have the dispute handled by one conciliator. For that reason, the default rule in article 6 is one conciliator.

References to UNCITRAL documents

A/CN.9/487 paras. 116 - 117
A/CN.9/WG.II/WP.113/Add.1, para. 5

Article 7. Appointment of conciliators

(1) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of the sole conciliator.

(2) In conciliation proceedings with two conciliators, each party appoints one conciliator.

(3) In conciliation proceedings consisting of three or more conciliators, each party appoints one conciliator and shall endeavour to reach agreement on the name of the other conciliators.

(4) Parties may seek the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular:

(a) a party may request such an institution or person to recommend names of suitable persons to act as conciliator; or

(b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

(5) In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

42. The intent here is to encourage the parties to agree on the selection of a conciliator. Although a suggestion was made while preparing the Model Law that the appointment of each conciliator should be agreed to by both parties, which would thereby avoid the perception of partisanship, the prevailing view was that the solution allowing each party to appoint a conciliator was the more practical approach. This approach allows for speedy commencement of the conciliation process and might foster settlement in the sense that the two party-appointed conciliators, while acting independently and impartially, would be in a better position to clarify the positions of the parties and thereby enhance the likelihood of settlement. When three or more conciliators are to be appointed, the conciliator other than the two party-appointed conciliators should in principle be appointed by agreement of the parties. This should foster greater confidence in the conciliation process. When no agreement may be reached on a conciliator, reference is to be had to an institution or third party.

43. When no agreement may be reached on a conciliator, reference has to be had to an institution or a third person. Subparagraphs (a) and (b) provide that that institution or person may simply provide names of recommended conciliators or, by agreement of the parties, directly appoint conciliators. Paragraph (5) sets out some guidelines for that person or institution to follow in making recommendations or appointments. These guidelines seek to foster the independence and impartiality of the conciliator.

References to UNCITRAL documents

A/CN.9/487 paras. 118 – 119
A/CN.9/WG.II/WP.113/Add.1, para. 5

Article 8. Conduct of conciliation

(1) The parties are free to agree, by reference to a set of rules or otherwise, upon the manner in which the conciliation is to be conducted.

(2) Failing agreement on the manner in which the conciliation is to be conducted, the conciliator or the panel of conciliators may conduct the conciliation proceedings in such a manner as the conciliator or the panel of conciliators considers appropriate, taking into account the circumstances of the case, any [views] [expectations] [intentions] [wishes] that the parties may express, and the need for a speedy settlement of the dispute.

(3) The conciliator shall be guided by principles of [objectivity, fairness and justice] [objectivity, impartiality and independence] and seek to maintain fairness in treatment as between the parties.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.

44. Paragraph (1) of this article stresses that the parties are free to agree on the manner in which the conciliation is to be conducted. It was derived from Article 19 of the UNCITRAL Model Law on International Commercial Arbitration.

45. Paragraph (2) recognizes the role of the conciliator who, while observing the will of the parties, may shape the process as he or she considers appropriate.

46. Paragraph (4) clarifies that a conciliator may, at any stage, make a proposal for settlement. Whether, to what extent, and at which stage the conciliator may make any such proposal will depend on many factors including the wishes of the parties and the techniques the conciliator considers to be most conducive to a settlement.

References to UNCITRAL documents

A/CN.9.WG.II/WP.110, paras. 91-92.

Article 9. Communication between conciliator and the parties

Unless otherwise agreed by the parties, the conciliator or the panel of conciliators may meet or communicate with the parties together or with each of them separately.

47. Separate meetings between the conciliator and the parties are, in practice, so usual that a conciliator is presumed to be free to use this technique, save for any express restriction agreed to by the parties. The purpose of this provision is to put this issue beyond doubt.

48. The conciliator should afford the parties equal treatment, which, however, is not intended to mean that equal time should be devoted for separate meetings with each party. The conciliator may explain to the parties in advance that there may be time discrepancies, both real and imagined, which should not be construed as other than the fact that the conciliator is taking time to explore all issues, interests and possibilities for settlement.

References to UNCITRAL documents

A/CN.9/468, paras. 54-55.

Article 10. Disclosure of information

When the conciliator or the panel of conciliators receives information concerning the dispute from a party, the conciliator or the panel of conciliators may disclose the substance of that information to the other party. However, the conciliator or the panel of conciliators shall not disclose information received from a party, when the party gives the information to the conciliator or the panel of conciliators subject to a specific condition that it be kept confidential.

49. Article 10 expresses the principle that, whatever information that a party gives to a conciliator, that information may be disclosed to the other party. Such disclosure fosters the confidence of both parties in the conciliation. However, the principle of disclosure is not absolute, in that, the conciliator has the freedom but not the duty to disclose such

information to the other party. As well, the conciliator has the duty not to disclose a particular piece of information when the party that gave the information to the conciliator made it subject to a specific condition that it be kept confidential. This approach is justified because the conciliator imposes no binding decision on the parties, unlike in arbitration where the duty of disclosure is absolute.

50. The intent is to foster open and frank communication of information between parties and, at the same time, to preserve the parties' rights to maintain confidentiality. The role of the conciliator is to cultivate a candid exchange of information regarding the dispute.

51. A broad notion of "information" is preferred in the context of this statutory rule. It is intended to cover all relevant information communicated by a party to the conciliator. The notion of "information", as used in this article, should be understood as covering communications that took place before the actual commencement of the conciliation.

References to UNCITRAL documents

A/CN.9/WG.II/WP.108; paras. 58-60
A/CN.9/468, paragraphs 54-55.
A/CN.9/487; paras. 130-134

Article 11. Termination of conciliation

The conciliation proceedings are terminated:

(a) by the conclusion of the settlement agreement by the parties, on the date of the agreement;

(b) by a written declaration of the conciliator or the panel of conciliators, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

52. The provision enumerates various circumstances in which there is no point for continuing proceedings and the conciliation ends. In subparagraph (a) the provision uses the expression "conclusion" instead of "signing" in order to better reflect the possibility of entering into a settlement by electronic communications.

References to UNCITRAL documents

A/CN.9/WG.II/WP.110; paras. 95 – 96
A/CN.9/487; para 136
C.f. Article 15 of the UNCITRAL Conciliation Rules

Article 12. Limitation period

(1) [When the conciliation proceedings commence, the running of the limitation period regarding the claim that is the subject matter of the conciliation is suspended.

(2) Where the conciliation proceedings have terminated without a settlement, the limitation period resumes running from the time the conciliation ended without a settlement.]

Article 13. Admissibility of evidence in other proceedings

(1) [Unless otherwise agreed by the parties,] a party who participated in the conciliation proceedings or a third person shall not rely on, or introduce as evidence, in arbitral or judicial proceedings, whether or not such arbitral or judicial proceedings relate to the dispute that is or was the subject of the conciliation proceedings:

(a) Views expressed or suggestions made by a party to the conciliation in respect of a possible settlement of the dispute;

(b) Statements or admissions made by a party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that a party to the conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator.

(2) Paragraph (1) of this article applies irrespective of [the form of the information or evidence referred to therein] [whether the information or evidence referred to therein is in oral or written form].

(3) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by the arbitral tribunal or the court [whether or not the arbitral or judicial proceedings relate to the dispute that is the subject of the conciliation proceedings unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings].

(4) Where evidence has been offered in contravention of paragraph (1) of this article, the arbitral tribunal or the court shall treat such evidence as inadmissible.

(5) Evidence that is admissible in arbitral or court proceedings does not become inadmissible as a consequence of being used in a conciliation.

53. In conciliation proceedings, the parties may typically express suggestions and views regarding proposals for a possible settlement, make admissions, or indicate their willingness to settle. If, despite such efforts, the conciliation does not result in a settlement and a party initiates judicial or arbitral proceedings, those views, suggestions, admissions or indications of willingness to settle might be used to the detriment of the party who made them. This possibility of such a "spillover" of information may discourage parties from actively trying to reach a settlement during conciliation proceedings, which would reduce the usefulness of conciliation.

54. Thus, this article is designed to encourage frank and candid discussions in conciliation by prohibiting the use of information listed in paragraph (1) in any later proceedings. The words "or a third person" are used to clarify that persons other than the party (for example,

witnesses or experts) who participated in the conciliation proceedings are also bound by paragraph (1).

55. The provision is needed in particular if the parties have not agreed on article 20 of the UNCITRAL Conciliation Rules which provides that the parties must not "rely on or introduce as evidence in arbitral or judicial proceedings ... :

(a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
(b) Admissions made by the other party in the course of the conciliation proceedings;
(c) Proposals made by the conciliator;
(d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator."

However even if the parties have agreed on a rule of that type, the legislative provision is useful because, at least under some legal systems, the court may not give full effect to agreements concerning the admissibility of evidence in court proceedings.

56. Confidentiality of party information disclosed during conciliation may become an issue in different contexts and should be safeguarded. The approach in this article is designed to eliminate any uncertainty as to whether the parties may agree not to use as evidence in arbitral or judicial proceedings certain facts that occurred during the conciliation.

57. The Model Law aims at preventing the use of certain information in subsequent judicial or arbitral proceedings regardless of whether the parties have agreed to a rule such as that contained in article 20 of the UNCITRAL Conciliation Rules. Where the parties have not agreed to such a rule, the Model Law intends to make it an implied term of an agreement to conciliate that the parties will not rely in any subsequent arbitral or judicial proceedings on evidence of the types specified in the model provisions. The specified evidence would then be inadmissible in evidence and the arbitral tribunal or the court could not order disclosure.

58. The prohibition in article 13 is intended to apply to the specified information regardless of whether they appear in a document.

59. In order to achieve the purpose of promoting candor between the parties engaged in a conciliation, they must be able to enter into the conciliation knowing the scope of the rule and that it will be applied. There may be situations, however, where evidence of certain facts would be inadmissible under article 13, but the inadmissibility would have to be overridden by an overwhelming need to accommodate compelling reasons of public policy. For example: the need to disclose threats made by a participant to inflict bodily harm or unlawful loss or damage; where a participant attempts to use the conciliation to plan or commit a crime; where evidence is needed to establish or disprove an allegation of professional misconduct based on the conduct occurring during a conciliation; where evidence is needed in a proceeding in which fraud or duress is in issue regarding the validity or enforceability of an agreement reached by the parties; where statements made during a conciliation shows a significant threat to public health or safety. Paragraph (3) of the article expresses such exception in a general manner.

60. Paragraph (3) provides that an arbitral tribunal or court shall not order the disclosure of information referred to in paragraph (1) unless such disclosure is permitted or required under the law governing the arbitral or judicial proceedings. This provision was considered necessary to properly clarify and reinforce paragraph (1).

61. In some legal systems a party may not be compelled to produce in court proceedings a document that enjoys a "privilege" - for example, a written communication between a client and its attorney. The privilege may, however, be deemed lost if a party has relied on the privileged document in a proceeding. Privileged documents may be presented in conciliation proceedings with a view to facilitating settlement. In order not to discourage the use of privileged documents in conciliation, the enacting State may wish to consider preparing a uniform provision stating that the use of a privileged document in conciliation proceedings does not constitute a waiver of the privilege.

References to UNCITRAL documents

A/CN.9/WG.II/WP.108; paras. 18-28
A/CN.9/WG.II/WP.110; paras. 98-100
A/CN.9/468; paras. 22-30
A/CN.9/485; paras 139-146
A/CN.9/WG.II/WP.113Add.1 at page 6
A/CN.9/487 paras. 139-141

Article 14. Role of conciliator in other proceedings

(1) Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that was or is the subject of the conciliation proceedings.

(2) Evidence given by the conciliator regarding the matters referred to in paragraph (1) of article 13 or regarding the conduct of either party during the conciliation proceedings, is not admissible in any arbitral or judicial proceedings [whether or not such arbitral or judicial proceedings relate to the dispute that is or was the subject of the conciliation proceedings] [in respect of a dispute that was or is the subject of the conciliation proceedings].

(3) [Paragraph (1) applies] [Paragraph (1) and (2) apply] also in respect of another dispute that has arisen from the same contract [or any related contract].

62. Article 14 reinforces the effect of article 13 by limiting the possibility of the conciliator acting as arbitrator and by restricting the possibility of the conciliator providing evidence in subsequent proceedings.

63. In some cases, the parties might regard prior knowledge on the part of the arbitrator as advantageous, particularly if the parties think that this knowledge would allow the arbitrator to conduct the case more efficiently. In these cases, the parties may actually prefer that the conciliator and not somebody else be appointed as an arbitrator in the subsequent arbitral proceedings. The provision poses no obstacle to the appointment of the former conciliator provided the parties depart from the rule by agreement – for example, by a joint appointment of the conciliator to serve as an arbitrator.

References to UNCITRAL documents

A/CN.9/WG.II/WP.110 footnote 30
A/CN.9/WG.II/WP.108; paras.29-33
A/CN.9/468; paras. 31-37
A/CN.9/485; paras. 148-153
A/CN.9/487; paras. 142-145

Article 15. Resort to arbitral proceedings

(1) During conciliation proceedings the parties shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, and a court or arbitral tribunal shall give effect to this obligation. Either party may nevertheless initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights. Initiation of such proceedings is not of itself to be regarded as termination of the conciliation proceedings.

(2) [To the extent that the parties have expressly undertaken not to initiate [during a certain time or until an event has occurred] arbitral or judicial proceedings with respect to a present or future dispute, such an undertaking shall be given effect by the court or the arbitral tribunal [until the terms of the agreement have been complied with].

(3) [The provisions of paragraphs (1) and (2) of this article do not prevent a party from approaching an appointing authority requesting it to appoint an arbitrator.]

64. Paragraph 1 of article 15 deals with the issue whether, and to what extent, the party may initiate court or arbitral proceedings during the course of conciliation proceedings. The idea behind this provision is to allow the parties to initiate arbitral or court proceedings only in circumstances where, in the opinion of the party initiating such proceedings, such action is "necessary for preserving its rights'. Possible circumstances that may require initiation of arbitral or court proceedings may include the necessity to seek interim measures of protection or to avoid the expiration of the limitation period.

65. Paragraph 2 deals with the effect of the agreement of the parties to engage in conciliation. The consequence of that provision is that the court or arbitral tribunal will be obliged to bar litigation or an arbitration from proceeding if that would be in violation of the agreement of the parties. Paragraph 2 does not contain the exception that is contained in paragraph 1, namely that a party may initiate arbitral or judicial proceedings where such proceedings are necessary for preserving its rights. [The Working Group may wish to consider whether such an exception would also be needed in paragraph 2 of article 15.]

References to UNCITRAL documents

A/CN.9/485, paras. 155-158
A/CN.9/468, paras 45-49

Article 16. Arbitrator acting as a conciliator

[It is not incompatible with the function of an arbitrator if the arbitrator raises the question of a possible conciliation and, to the extent agreed to by the parties, participates in efforts to reach an agreed settlement.]

References to UNCITRAL documents

A/CN.9/WG.II/WP.108 paras. 29-33
A/CN.9/487; paras. 151-152
A/CN.9/WG.II/WP.110 paras. 103-104
A/CN.9/468, paras. 41-44
A/49/17 (reproduced in the UNCITRAL Yearbook, vol XXV: 1994)

Article 17. Enforceability of settlement

[Variant A]

If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the settlement agreement, that agreement is binding and enforceable *[the enacting State inserts provision specifying provisions for the enforceability of such agreements]*.

[Variant B]

If the parties reach agreement on a settlement of the dispute, that agreement is binding and enforceable as a contract.

[Variant C]

If the parties reach agreement on a settlement of the dispute, they may appoint an arbitral tribunal, including by appointing the conciliator or a member of the panel of conciliators, and request the arbitral tribunal to record the settlement in the form of an arbitral award on agreed terms.

[Variant D]

If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the settlement agreement, that agreement is binding and enforceable as an arbitral award.

66. Legislative solutions regarding the enforceability of settlements reached in conciliation proceedings differ widely. Many practitioners have put forward the view that the attractiveness of conciliation would be increased if a settlement reached during a conciliation would, for the purposes of enforcement, be treated as or similarly to an arbitral award. Reasons given for introducing expedited enforcement usually aim to foster the use of conciliation and to avoid situations where a court action to enforce a settlement might take months or years to reach judgement.

67. Variant A purports to reflect the view that the model legislative provisions should merely state the principle that the settlement agreement is enforceable, without attempting to provide a unified solution as to how such settlement agreements might become "enforceable". Under this variation, enforceability is a matter that should be left to the law of each enacting State.

68. Some States have no special provisions on the enforceability of such settlements, with the result that they would be enforceable as any contract between the parties. This understanding that conciliation settlements were enforceable as contracts has been restated in some laws on conciliation. Variant B reflects this approach. Under that variant, the settlement agreement is not required to be signed by the parties and the conciliator or the panel of conciliators in order not to interfere

with existing contract law through the imposition of specific form requirements for the formation of that contract.

69. In some national legislation, parties who had settled a dispute are empowered to appoint an arbitrator specifically to issue an award based on the agreement of the parties. Variant C is modeled on this approach. It is based on article 30 of the UNCITRAL Model Law on International Commercial Arbitration and offers a basic procedural framework as to how a settlement agreement may become expressed in the form of an arbitral award.

70. Variant D reflects the view that, in determining its enforceability, a settlement agreement should be dealt with as an arbitral award. By subjecting conciliation settlements to the enforcement rules governing arbitral awards, the enforcement of these settlements would be simplified and expedited. Typically this would mean that conciliation settlements would be enforced by the court without reopening factual or substantive legal questions (except for questions of public policy). This variant, however, offers no indication as to the procedure through which such an arbitral award is produced. For guidance about the meaning of the words "enforceable as an arbitral award", see the more detailed provisions of articles 30, 35 and 36 of the UNCITRAL Model Law on International Commercial Arbitration.

71. Some legal systems provide for enforcement in a summary fashion if the parties and their attorneys signed the settlement agreement and it contained a statement that the parties may seek summary enforcement of the agreement. Also, settlements might be the subject of expedited enforcement if, for example, the settlement agreement was notarized or formalized by a judge or co-signed by the counsel of the parties. [Depending on the Working Group's decision on article 17, it may be decided to include these examples in the Guide to Enactment for the benefit of those States that may wish to include such measures designed to facilitate enforcement of such settlements in their legislation].

References to UNCITRAL documents

A/CN.9/487; paras. 153-159
A/CN.9/WG.II/WP.110 paras 105-112
A/CN.9/468; paras 38-40
A/CN.9/WG.II/WP.108 paras 34-42